

**Before the
Federal Communications Commission
Washington D.C. 20554**

In the Matter of)	
)	
Telecommunications Carriers Eligible to Receive Universal Service Support)	WC Docket No. 09-197
)	
TIME WARNER CABLE INC.)	
)	
Petition for Forbearance)	

Comments of the New York State Telecommunications Association, Inc.

Pursuant to Public Notice, DA 12-1920, issued November 30, 2012, the New York State Telecommunications Association, Inc. ("NYSTA"), by counsel and on behalf of its smaller rural Incumbent Local Exchange Carrier ("ILEC") members, hereby files these comments on the pending "Petition for Forbearance of Time Warner Cable" ("*TWC Forbearance Petition*"). In its petition, Time Warner Cable Inc. (TWC") seeks forbearance by the Federal Communications Commission ("FCC" or "Commission") with respect to the Commission's enforcement of "Section 214(e)(5) of the Act and Section 54.207 of the Commission's rules (which implements Section 214(e)(5)) in connection with TWC's pending and future applications for limited designation as an eligible telecommunications carrier ("ETC") to participate in the Lifeline program."¹

While NYSTA recognizes the importance of the Commission's Lifeline program which is implicated by the *TWC Forbearance Petition*, NYSTA respectfully submits that the FCC should deny the TWC request. TWC has failed to provide the necessary factual basis for its requested relief under 47 U.S.C. §160, merely providing non-specific assertions as if facts. As explained herein, any and all fact finding is anticipated to be developed by action taken by the

¹ *TWC Forbearance Petition* at 1 (footnotes omitted).

New York Public Service Commission (the “NY PSC”) on a pending request by a TWC subsidiary for a modification of an ETC designation with respect to certain of the NYSTA rural ILEC service areas within the State of New York.² Absent these facts, TWC’s efforts to make broad assertions to attempt to fit within the FCC’s *NTCH/Cricket Order*³ must fail, particularly since the FCC has made clear that its “ability to analyze a petition for forbearance is highly dependent on knowing the exact scope of the requested forbearance.”⁴ Thus, for the following reasons, the *TWC Forbearance Petition* should be denied.

² NYSTA notes that Time Warner Information Services (New York), LLC (“TWCIS (NY)”), which states that it is a wholly-owned subsidiary of TWC, has filed a request with the NY PSC for designation for over twenty NYSTA rural ILEC areas. See *Petition for Modification of Existing Eligible Telecommunications Carrier Designation*, Case No. 12-C-0510, filed November 13, 2012 (“*TWCIS (NY) NY PSC Petition*”). The NY PSC has established initial procedures with respect to its review of the *TWCIS (NY) NY PSC Petition*, with comments due January 10, 2013 and reply comments due January 24, 2013. See *Notice Inviting Comments*, Case 12-C-0510, issued December 11, 2012 (“*NY PSC Notice Inviting Comments*”). The following link can be used to access the NY PSC’s website for a copy the *TWCIS (NY) NY PSC Petition* along with other filings made in the proceeding: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=12-C-0510>. The impact on the ILEC members of NYSTA (which include all companies except the Frontier Communications Corporation companies), provides a basis for NYSTA’s interest and standing to file these comments opposing the *TWC Forbearance Petition*.

³ See *In the Matter of Telecommunications Carriers Eligible for Universal Service Support, NTCH, Inc. Petition for Forbearance from 47 U.S.C. §214(e)(5) and 47 C.F.R. §54.209(b), Cricket Communications, Inc. Petition for Forbearance, Order*, WC Docket No. 09-197, 26 FCC Rcd 13723 (2011)(“*NTCH/Cricket Order*”).

⁴ See *id.* at ¶ 9 citing *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, *Report and Order*, 24 FCC Rcd 9543, 9551, 9553, ¶¶ 13, 16 (2009) (“*Forbearance Procedures Order*”). As the FCC stated,

In particular, the petition must state the following with specificity: (1) each statutory provision, rule, or requirement from which forbearance is sought; (2) *each carrier, or group of carriers, for which forbearance is sought*; (3) each service for which forbearance is sought; (4) the geographic location, zone, or area in which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief. The Commission’s ability to make the determinations within the statutory time frame required is significantly compromised when a petition does not clearly state the relief sought.

First, TWC has failed to establish that it has the standing under 47 U.S.C. §160 to make the filing. TWC has described itself to be “a leading facilities-based provider of competitive voice services.”⁵ While that status may provide it some ability to comment on VoIP-related issues, it does not provide the basis for the relief that it apparently seeks for itself. Section 160 of the Communications Act of 1934, as amended (the “Act”) states that, subject to statutorily required findings, forbearance is available to “to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets. . . .”⁶ Conspicuously absent from the *TWC Forbearance Petition*, however, is any demonstration or statement that TWC itself is a “telecommunications carrier,” offers “telecommunications service”, is part of a “class of telecommunications carriers” or offers something within a “class of . . . telecommunications services.”⁷ These fundamental prerequisites – telecommunications carrier and telecommunications services – cannot be brushed aside as these terms carry with them statutory meaning⁸ as effectively equating them to common carriers⁹ and thus their common carrier

Forbearance Procedures Order at ¶16 (emphasis added). In addition, the FCC noted that a petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance. Specifically, the *prima facie* case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought.

Id. at ¶17 (footnote omitted). The Commission also indicated that, while it “discourage[s] needless redundancy, we do require express cross reference; *the Commission will not assume relationships that a petition does not state.*” *Id.*, n. 67 (emphasis added).

⁵ *TWC Forbearance Petition* at 2, *see also id.* at 2-3.

⁶ 47 U.S.C. §160(a).

⁷ *Id.*

⁸ *See* 47 U.S.C. §§153(51), (53), respectively.

services. Yet, the FCC has not made a finding with respect to the regulatory classification of interconnected VoIP providers as telecommunications carriers or that VoIP services are telecommunications services¹⁰ (which are the services that TWC indicates it provides¹¹). While TWC may have subsidiaries that are either telecommunications carriers and are (or will be) providers of retail telecommunications services,¹² it is only those entities that have the statutory standing to seek the relief being requested in the *TWC Forbearance Petition*.¹³

Second, and with respect to those TWC subsidiaries (“TWC Subs”) that are, in fact, holding themselves out as telecommunications carriers and presumably offering telecommunications services, the *TWC Forbearance Petition* only references one such entity operating in New York.¹⁴ But, this entity did not file the instant request of forbearance; its parent TWC filed the instant petition. Effectively, therefore, TWC seems to seek a grant of its requested relief so that it can use that relief at any time for any entity that TWC believes is appropriate, *i.e.*, in “those areas in other states in which TWC may seek designation as an ETC

⁹ See, *e.g.*, *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999).

¹⁰ See, *e.g.*, *In the Matter of Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 *et al.*, 26 FCC Rcd 17663 at ¶954 (2011), *appeal pending*, In Re: FCC 11-161, No. 11-9900 (10th Cir.).

¹¹ See *TWC Forbearance Petition* at 3.

¹² See *id.*, Appendix A, ¶ 2.

¹³ Of course, the extent to which any such TWC subsidiary is offering a retail telecommunications service – which is the context under which Lifeline service is offered (*see* 47 C.F.R. §54.401(a) (“As used in this subpart, Lifeline means a non-transferable *retail service* offering. . . .” (emphasis added) -- is not made clear in the *TWC Forbearance Petition*. This retail status is separate and apart from providing wholesale telecommunications services. See, *e.g.*, *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order*, WC Docket No. 06-55, 22 FCC Rcd 3513 (WCB 2007) at ¶¶ 4, 8.

¹⁴ See *TWC Forbearance Petition* at 3; *see also id.* at 4.

from the relevant state commission pursuant to Section 214(e)(2) of the Act.”¹⁵ That assertion has not been reconciled with the “specificity” and “detail” required by the FCC in its *Forbearance Procedures Order*.¹⁶ Based on the lack of facts, NYSTA respectfully submits that this type of global designation is inappropriate and not consistent with the FCC’s stated requirements for a forbearance petition.

Further, TWC has not demonstrated that other TWC Subs may be included in a similarly situated class of providers or, for that matter, any details when or where such class may be created. TWC cannot be permitted to side-step this additional statutory criterion as it has for its standing to seek the requested relief in the first place. The eligible TWC Subs should be disclosed and evidence must be provided to demonstrate that each entity is generally qualified to seek an ETC designation¹⁷ so that the FCC and all parties know the extent of the relief being requested and whether the factual determinations required under Section 160 of the Act can be made for the applicant. While the FCC has indicated that it can revisit forbearance determinations in the future,¹⁸ that retention of authority is a far cry from knowing what the FCC is being asked to do in the first instance, particularly since the Commission’s “ability to analyze a petition for forbearance is highly dependent on knowing the exact scope of the requested forbearance.”¹⁹

¹⁵ See *id.*, Appendix A, ¶ 4.

¹⁶ See *Forbearance Procedures Order* at ¶¶ 16-17; see also n. 4, *supra*.

¹⁷ Ultimately, the application for ETC status will need to be reviewed and acted upon by the appropriate state commission, which in New York will be the NY PSC.

¹⁸ See *NTCH/Cricket Order* at ¶18.

¹⁹ See *id.* at ¶ 9 (footnote omitted); see also n.4, *supra*.

Third, TWC relies on the *NTCH/Cricket Order* and the FCC's *Virgin Mobile Order*²⁰ for the claims²¹ that TWC's and the TWC Subs' "charges, practices, classifications, or regulations . . . are just and reasonable and not unjustly or unreasonably discriminatory"²² and will remain just reasonable and non-discriminatory as required by 47 U.S.C. §160(a)(1). However, TWC's claims include no representation with respect to its classifications or practices required by the statute. Moreover, TWC provides no detail with respect to its claims that its telecommunications service rates applicable to a Lifeline offering will be just, reasonably and non-discriminatory. In addition, TWC has failed to reconcile its claims with the fact that the FCC's discussion *NTCH/Cricket Order* and *Virgin Mobile Order* were made in the context of wireless providers with respect to which state commissions have been preempted regarding such providers' rates.²³ Here, the TWC Sub operating in New York is subject to the NY PSC's jurisdiction regarding any of its intrastate telecommunications service offerings. Thus, TWC's efforts to engage in rote recitation of what the FCC may have stated in factually different contexts cannot be sustained in an effort to meet its burden under Section 160 of the Act regarding what otherwise needs to be proven for a TWC Sub.²⁴

Fourth, and building upon the prior point, the Commission has made clear within the *NTCH/Cricket Order* that any action on a petition such as that filed by TWC would be

²⁰ See *In the Matter of Virgin Mobile USA, L.P., Petition for Forbearance from 47 U.S.C. §214(e)(1)(A) et al., Order*, CC Docket No. 96-45, 24 FCC Rcd 3381 (2009) ("*Virgin Mobile Order*").

²¹ See *TWC Forbearance Petition* at 5-6.

²² 47 U.S.C. § 160(a)(1).

²³ See 47 U.S.C. §332(c)(3).

²⁴ While TWC notes the backstop of 47 U.S.C. §§201 and 202 (see *TWC Forbearance Petition* at 6), those sections do not supplant the NY PSC's oversight of the New York TWC Sub's provision of the local services (actually local telecommunications services) that such subsidiary will be required to offer as a telecommunications carrier.

executory/conditional in nature based on the state commission's rightful and statutorily-preserved role of designating ETCs, which here is a wireline ETC designation.²⁵ NYSTA respectfully notes that the NY PSC's role in reviewing the factual assertions made by TWC and the regulatory classification of the underlying services related to the purported limited Lifeline ETC designation that the New York TWC Sub seeks are integral to each of Section 160's required findings, not only with respect to rate-related findings and consumer affects, but also the public interest.²⁶ With respect to the claims made by TWC regarding consumer impacts, in particular, there is no factual evidence provided that supports the alleged conclusion that

²⁵ As the FCC has stated:

We also disagree with the argument that granting these petitions will eliminate the role of states in ETC designation and redefinition. Forbearance in these limited circumstances merely removes the conformance requirement for NTCH and Cricket when seeking ETC designation for Lifeline-only support, so that states, which have jurisdiction over most ETCs, may now designate NTCH or Cricket as limited ETCs eligible for Lifeline only support in part of a rural service area without requiring redefinition of that rural service area. State commissions are still required to consider the public interest, convenience and necessity of designating Cricket and NTCH as a competitive ETC in a rural area already served by a rural telephone company. Our action does not disturb the roles of state commissions and this Commission in the ETC designation process or in the redefinition process in other circumstances when redefinition is required.

NTCH/Cricket Order at ¶14 (footnotes omitted), ¶18 (“We also note that state commissions and this Commission are still required to make an independent assessment as to whether granting NTCH and Cricket an ETC designation is in the public interest before including any part of a rural service area in NTCH’s or Cricket’s service area.” (footnote omitted)). The FCC also made clear twice that the forbearance did not apply for other federal Universal Service programs such as the high cost program (*see id.* at ¶¶ 14 (n. 50), 18.

²⁶ *See generally* 47 U.S.C. §§160(a)(1)–(3).

consumers will not be harmed²⁷ until and unless the NY PSC makes such conclusions based on the fact-finding that it will undertake.²⁸

Similarly in the context of the public interest, it is uncertain what basis TWC has for claiming that any Lifeline subsidy can be used for TWC's long distance.²⁹ Long distance service is not a supported service.³⁰ Similarly, in the context of its "double-play" and "triple play bundles",³¹ it is uncertain what basis TWC has for claiming that any Lifeline discount will only be applied by it "to the voice component of the bundle",³² or can be used for "double-play" and "triple play bundles",³³ when the NY PSC has yet to make any specific factual determination as to the just and reasonableness of the local service and rate components included in those bundled offerings described in the *TWCIS (NY) NY PSC Petition*. Absent such findings, and since non-telecommunications services are not local exchange service offerings, adoption of what TWC has claimed could lead one to conclude that federal Universal Service Fund disbursements can lawfully be used to fund non-supported services.

²⁷ See *TWC Forbearance Petition* at 6-7. TWC improperly attempts to narrowly construe the requirement with respect to consumer protections. TWC's contention can be tested by the fact finding and consequences of such fact finding by the NY PSC when it acts.

²⁸ See generally *NY PSC Notice Inviting Comments*.

²⁹ See *id.* at 7 ("... TWCIS (NY) plans to offer several low-priced service plans to Lifeline subscribers, including (i) *separate plans* offering local-only, unlimited in-state, and unlimited nationwide calling. . . .") (emphasis added).

³⁰ See 47 C.F.R. §54.101; see also 47 C.F.R. § 54.401(a) ("As used in this subpart, Lifeline means a non-transferable retail service offering: . . . 2) That provides qualifying low-income consumers with voice telephony service as specified in § 54.101(a). Toll limitation service does not need to be offered for any Lifeline service that does not distinguish between toll and non-toll calls in the pricing of the service.").

³¹ *TWC Forbearance Petition* at 7.

³² *Id.* at 7, n. 20.

³³ *Id.* at 7.

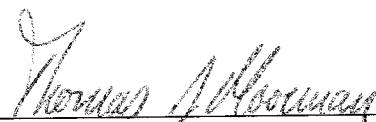
The current review initiated by the NY PSC is a necessary precondition for the very §160 statutory demonstrations that are required. Consequently, the conditional nature of what the FCC granted in the *NTCH/Cricket Order* is improper.

Based upon the above, NYSTA respectfully submits that the *TWC Forbearance Petition* should be denied.

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Respectfully submitted,

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